No. 09-1238

In The
Supreme Court of the United States

DENNIS HOLLINGSWORTH, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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July 19, 2010

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STATUTE

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Petitioners have suggested that the issue presented in their petition for certiorari has become moot and have asked this Court to vacate the order below in accordance with this Court's "established practice" when a case has "become moot while on its way here or pending [this Court's] decision on the merits." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Respondents agree that the case is moot, noting that the district court, "[i]n accordance with the stay" entered by this Court, "limited transmission of the trial court proceedings to an overflow courtroom 'within the confines of the courthouse in which trial [was] held.'" Brief of Respondents in Opposition for Kristin M. Perry, *et al.* ("Opp. Cert.") at 3, quoting Pet. App. 35. Respondents oppose vacatur of the order below, however, arguing that such relief is "unprecedented" and "unorthodox" in the absence of "extraordinary circumstances," although respondents fail to specify or otherwise describe what such circumstances might entail.

As we demonstrate below, respondents have misread the law on the proper disposition by this Court of mooted federal cases. Moreover, recent developments in the litigation below, which were not disclosed in respondents' brief in opposition, confirm that this Court should grant the petition for a writ of certiorari, vacate the order entered by the Ninth Circuit denying the petition for a writ of mandamus, and remand with instructions to dismiss the mandamus petition as moot.

I. This Court's Settled Precedents and Established Practice Make Clear that Petitioners Are Entitled to *Munsingwear* Relief.

Far from "unorthodox," Opp. Cert. at 5, or "unprecedented," *id.* at 1, vacatur of lower federal court judgments in mooted cases has been the "established," "ordinary," "settled," and "commonly utilized" procedure in this Court for over 60 years. Indeed, as this Court made clear in *Munsingwear*,

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. . . . That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

340 U.S. at 39-40; *see also id.* at 41 (explaining that this procedure is "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences"); 28 U.S.C. § 2106.

Respondents argue that we have "overlook[ed]" *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18 (1994). *See* Opp. Cert. at 5. To the contrary, *Bancorp* in no way undermined the

settled rule that applies in these circumstances, for the Court in that case merely declined to extend the *Munsingwear* rule to cases that become moot by *reason of settlement*:

> We hold that mootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course.

Id. at 29. Indeed, the *Bancorp* Court expressly embraced the *Munsingwear* rule when, as here, mootness arises from other causes. As the Court explained:

> A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . . The same is true when mootness results from unilateral action of the party who prevailed below.

Id. at 25.

Thus, while *Bancorp* held that a showing of "exceptional circumstances" *is* necessary to obtain vacatur when mootness results from a settlement, 513 U.S. at 29, it reaffirmed categorically that "fairness," *id.* at 25, and "the public interest," *id.* at 27, militate in favor of vacatur when mootness results

from "the vagaries of circumstance" or the "unilateral action of the party who prevailed below," *id.* at 25. In such circumstances, mootness without more "provides sufficient reason to vacate." *Id.* at 25 n.3.

Respondents' interpretation of *Bancorp* is thus belied by the express language of that very decision. But it is also refuted by this Court's subsequent decisions. Indeed, just this Term, this Court reaffirmed that it "normally do[es] vacate the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez v. Smith*, 130 S. Ct. 576, 581 (2009) (quoting *Munsingwear*, 340 U.S. at 40); *see also id.* ("In *Bancorp*, however, we described circumstances where we would not do so."). And, consistent with its "ordinary practice," *id.* at 583, this Court has repeatedly and routinely granted certiorari, vacated the appellate decision below, and remanded with orders to dismiss as a matter of course where a federal case has become moot for reasons other than a settlement. *See, e.g., Indiana State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015 (2009); *Radian Guaranty, Inc. v. Whitfield*, 128 S. Ct. 2901 (2008); *Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007); *Harper v. Poway Unified School District*, 549 U.S. 1262 (2007). This Court's settled practice thus refutes respondents' hyperbolic

claims that "profound consequences," and "serious repercussions," Opp. Cert. at 6, would result from granting the standard *Munsingwear* relief sought by petitioners in this case.

Nor do the four other cases cited by respondents support their claim that – outside the context of mootness resulting from a settlement – "[w]here an issue on which review is being requested is acknowledged to be moot at the time the Court considers a petition for certiorari . . . the appropriate course is to deny or dismiss the petition." Opp. Cert. at 4. Three of those decisions involved petitions for review of a *state court* judgment. *See Aguilar v. Quarterman*, 547 U.S. 1204 (2006) (No. 05-11108) (Tex. Ct. Crim. App.); *Jordan v. Ohio*, 543 U.S. 952 (2004) (No. 04-5574) (Ohio); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (Wis. Ct. App.). As this Court has made clear, however, the *Munsingwear* rule, which is predicated on this Court's "supervisory authority over the lower federal courts," does not apply to cases arising in the state courts. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989). Thus, for cases arising in the lower *federal courts*, "the settled disposition of a case that has become entirely moot is for this Court to 'vacate the judgment below and remand with a direction to dismiss.'" *Id.* (quoting *Munsingwear*, 340 U.S. at 39). But for cases arising in the *state courts*, "the regular practice . . . has been to dismiss the case and leave the judgment of the state court undisturbed, which evinces a proper recognition that in

the absence of any live case or controversy, [this Court] lack[s] jurisdiction and thus also the power to disturb the state court's judgment." *Id.*; *accord City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. at 283-84. And in the fourth case cited by respondents – a capital case that became moot by reason of the petitioner's execution, *see Williams v. Allen*, 552 U.S. 803 (2007) (No. 07-6034) – there is no indication that the petitioner sought (or could have sought) vacatur. It has long been established, however, that a party waives its right to vacatur by not seeking that remedy. *See, e.g.*, *Munsingwear*, 340 U.S. at 40-41.[1]

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[1] Respondents also invoke *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), and *Lawrence v. Chater*, 516 U.S. 163 (1996), in support of their argument for disregarding the *Munsingwear* rule. Neither decision supports respondents, however. In *Arizonans for Official English*, the Court expressly recognized "'the established practice'" of vacatur "when mootness occurs though happenstance" or "the 'unilateral action of the party who prevailed in the lower court.'" *Id.* at 71-72 (quoting *Munsingwear*, 340 U.S. at 39, and *Bancorp*, 513 U.S. at 23). And while the Court did note the "'exceptional circumstances' that abound[ed]" in that case, it did so in support of its decision to vacate not only the unreviewable decision of the appellate court, but all of the previous decisions – including those of the trial court – in that case. *Id.* at 75 (concluding "that vacatur down the line is the equitable solution"). *Lawrence* did not even address the appropriate disposition of a case that has become moot pending review by this Court. Rather, it addressed the distinct disposition of granting, vacating, and remanding *for further proceedings* in light of intervening developments. *See* 516 U.S. 165-66; *id.* at 178 & n.1 (Scalia, J., dissenting). In all events, the Court in that case reaffirmed its broad authority and discretion

(Continued on following page)

In this case, respondents do not contend that mootness has arisen because of a settlement or other voluntary action by the petitioners. Rather, the events that have mooted the controversy regarding the district court's order allowing dissemination of the trial proceedings outside "the confines of the courthouse where the trial [was] held" – specifically, this Court's stay of the district court's order allowing such dissemination and the district court's subsequent withdrawal both of its order and of the amendment to the local rules purporting to authorize that order – are classic examples of "the vagaries of circumstance," "happenstance," and perhaps even the "unilateral action of the party who prevailed below"[2] within the meaning of *Munsingwear* and its progeny. *See Bancorp*, 513 U.S. at 25 & n.3. Accordingly, because the controversy regarding the public broadcast of the trial proceedings in this case has become moot, "fairness" and "the public interest" plainly require vacatur of the Ninth Circuit's order pursuant to this Court's "established practice." *Id.* at 25, 27; *Munsingwear*, 340 U.S. at 39.

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to order such a disposition and indeed did so in that case. *Id.* at 165-66.

[2] The district court was the nominal defendant in the mandamus proceeding below.

II. Post-Petition Developments Confirm that this Court Should Grant *Munsingwear* Relief.

While the fact that the controversy regarding the public broadcast of the trial proceedings has become moot, standing alone, "provides sufficient reason to vacate" the order below under this Court's precedents, *Bancorp*, 513 U.S. at 25 n.3, significant developments have occurred subsequent to the filing of the petition for a writ of certiorari that confirm that this Court should grant the petition, vacate the Ninth's Circuit's order, and remand with instructions to dismiss the mandamus petition as moot.

Although the district court unequivocally assured petitioners that the sole purpose of its continued video recording of the trial proceedings in this case was for its own use in chambers, *see* App. 41a-43a; Supp. App. 2a, the district court *sua sponte* issued the following order on May 31, 2010:

> In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party. Parties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order, Doc # 425. Any party wishing to make use of the video during closing arguments is DIRECTED to inform the court clerk not later than June 2, 2010 at 5 PM PDT.

Supp. App. 14a. Respondents (plaintiffs below) requested and were given a video recording of the entire trial, *see* Supp. App. 18a, and they played portions of that recording during closing arguments, *see* Supp. App. 29a-30a. Plaintiff-Intervenor City and County of San Francisco requested and was given portions of the trial recording, *see* Supp. App. 15a, but did not seek to play any portion of that recording at during closing arguments.[3]

Furthermore, after the conclusion of closing arguments, petitioners requested that respondents and the plaintiff-intervenor promptly return all copies of the trial video to the district court. When that request was refused, petitioners moved the district court on June 29, 2010 "for an order requiring Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession." Supp. App. 25a. Both respondents and the plaintiff-intervenor opposed this request, proposing instead "that once judgment is entered, the parties and the Court evaluate whether, and to what degree, the trial recording would be useful to the parties or to

[3] The district court did not, however, permit the broadcasting of closing arguments outside of the courthouse. *See, e.g.*, Supp. App. 21a (denying media coalition's request for "recording, broadcasting and webcasting closing arguments"); *see also* Supp. App. 3a-5a (media coalition's request); *id.* 6a-11a (petitioners' objection to media coalition's request).

the Court in connection with any additional proceedings and/or appeal." Supp. App. 29a-30a. The district court has not yet ruled on this matter.

Thus, while all concede that petitioners' attempt to obtain mandamus relief reversing the district court's order permitting the broadcast of the trial proceedings outside of the courthouse has become moot, *see* Opp. Cert. at 4, a dispute over the proper disposition of the video recordings made by the district court for its own use "in chambers" has already arisen. Indeed, respondents' indication that they may wish to use those recordings in connection with appeals in this case – which could implicate many of the concerns that prompted petitioners to oppose public broadcast of the trial proceedings in the first instance – suggests that litigation relating to the appropriate use of these recordings may occur in the future. Petitioners respectfully submit that vacatur is uniquely warranted given these exceptional circumstances to prevent the Ninth Circuit's judgment, now "unreviewable because of mootness, from spawning any legal consequences" in ongoing or subsequent litigation between the parties below. *Munsingwear*, 340 U.S. at 41.

For the foregoing reasons, as well as those reasons stated in the petition for a writ of certiorari, petitioners respectfully request that this Court grant the petition, vacate the order of the Ninth Circuit denying their petition for a writ of mandamus, and

remand to the Ninth Circuit with instructions to dismiss the mandamus petition as moot.

Respectfully submitted,

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July 19, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as

No C 09-2292 VRW

NOTICE TO PARTIES

(Filed Jan. 15, 2010)

registrar-recorder/county clerk
for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA [sic] RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors. /

In compliance with the Supreme Court's order in *Hollingsworth v Perry*, 558 US___, No 09A648 (January 13, 2010), as noted on the record at trial this date, the undersigned has formally requested Chief Judge Kozinski to withdraw this case from the pilot project on transmitting trial court proceedings to remote federal courthouse locations or for broadcast or webcast approved by the Ninth Circuit Judicial Council on December 17, 2009. Transmission of the proceedings to other locations solely within the San Francisco courthouse will continue along with recording for use in chambers, as permitted in Civ LR 77-3.

/s/ Vaughn Walker
VAUGHN R WALKER
United States District
Chief Judge

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May 18, 2010

The Honorable Vaughn R. Walker
Chief Judge of the U.S. District Court
Northern District of California
Courtroom 6, 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

Re: **Case No. 09-CV-02292-VRW *Perry, et al v. Schwarzenegger, et al***
Media Coalition's Request for Camera Access to Record Closing Arguments

Dear Judge Walker:

On behalf Cable News Network, In Session (formerly known as "Court TV"), Fox News, NBC News, CBS News, the Hearst Corporation, Dow Jones & Company, Inc., the Associated Press, the Los Angeles Times, the McClatchy Company, KQED Public Radio (and on behalf of National Public Radio) and the Northern California Chapter of the Radio & Television News Directors Association (the "Media Coalition"), we write to inform the Court of the Media Coalition's interest in recording, broadcasting and webcasting the closing arguments (tentatively scheduled for June 16, 2010) in this case. We also request that

the Court approve this access request and formally ask Chief Judge Kozinski to again include this case in the pilot project approved by the Ninth Circuit Judicial Council on December 17, 2009, for the sole purpose of recording, broadcasting and webcasting the parties' respective closing arguments.

The Media Coalition respectfully make this request with appreciation of the U.S. Supreme Court's opinion in *Hollingsworth v. Perry,* 558 U.S., No. 09A648 (Jan. 13, 2010), which two days later, led this Court to formally request that Chief Judge Kozinski withdraw this case from the Ninth Circuit's pilot project. Since then, the United States District Court for the Northern District of California re-opened the public comment period (which ran from February 4 through March 4, 2010) and effective April 20, 2010, local rule 77-3 was amended to authorize "the taking of photographs, public broadcasting or televising, or recording" as a part of "a pilot or other project authorized by the Judicial Council of the Ninth Circuit." The Court's change to local rule 77-3 was consistent with federal law and the Supreme Court's January 13th opinion. Moreover, because the June 16th court proceedings will solely consist of the arguments of counsel – and not witness testimony or evidence – the concerns earlier reviewed by the Supreme Court should not preclude this opportunity to enhance the public's ability to witness the parties' respective closing arguments in this historic case.

If the requested electronic access is granted by this Court and Chief Judge Kozinski, the Media Coalition

will be prepared to assist the Court's staff to address any technical or logistical issues to facilitate the recording, broadcasting and webcasting of this anticipated one-day proceeding.

On behalf of the Media Coalition, we appreciate the Court's consideration of this request.

Respectfully submitted,

Davis Wright Tremaine LLP for the Media Coalition

/s/ Thomas R. Burke
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May 24, 2010

The Honorable Vaughn R. Walker
Chief Judge
United States District Court for the
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *Perry v. Schwarzenegger*, No. C-09-2292 VRW (N.D. Cal.)

Dear Chief Judge Walker:

I write on behalf of Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and Protect-Marrige.com ("Proponents") in response to the Media Coalition's letter of May 18, 2010, Doc # 670, and to reiterate our objection to public broadcast of the trial proceedings in this case. Despite the Supreme Court's determination that "[t]his case is . . . not a good one for a [public broadcast] pilot program," *Hollingsworth v. Perry,* 130 S. Ct. 705, 714 (2010), the Media Coalition again asks this Court to publicly broadcast a portion of the trial proceedings. Proponents respectfully submit that an order permitting public

broadcast would violate (i) the letter and spirit of the Supreme Court's stay order, (ii) the only valid Northern District of California and Ninth Circuit policies bearing upon this issue, and (iii) Proponents' due process rights to a fair trial. Accordingly, the Media Coalition's request should be promptly rejected.

First, an order allowing trial proceedings to be broadcast publicly would violate the Supreme Court's stay of this Court's order authorizing "the broadcast of [this] federal trial." *Hollingsworth,* 130 S. Ct. at 706; *see also id.* at 709 ("We therefore stay the court's January 7, 2010, order to the extent that it permits the live streaming of court proceedings. . . ."). As the Court explained, even "[i]f Local Rule 77-3 had been validly revised, questions would still remain about the District Court's decision to allow broadcasting of this particular trial." *Id.* at 714. These questions led the Court to conclude, as noted above, that this case is ill-suited for inclusion in an experimental pilot program.

Second, under controlling Ninth Circuit policy, this Court has no authority to enter an order permitting public broadcast in this case, and to the extent revised L.R. 77-3 purports to allow for such authority, it is invalid. Pursuant to federal statute, the Ninth Circuit Judicial Council is authorized to make or amend "[a]ny general order relating to practice and procedure . . . *only after* giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 332(d)(1) (emphasis added). In 1996, the Ninth Circuit Judicial Council "adopt[ed] the policy of

the Judicial Conference of the United States" banning the public broadcast of proceedings in federal district courts. *See* Doc # 324-1 at 4 (hereinafter the "1996 Policy"). Since that time, the Judicial Council has not given "appropriate notice and an opportunity for comment" of a proposed amendment to the governing 1996 Policy. The Judicial Council did issue a press release on December 17, 2009, stating that it "has approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit" – an "action" which purports to "amend[ ] [the] 1996 Ninth Circuit policy."[1] The December 17 press release, however, did not comport with the statutory requirements for notice and comment and is therefore invalid. *See* 130 S. Ct. at 711 (concluding that the amended version of L.R. 77-3 "appears to be invalid" because the Court failed to give the statutorily required public notice and an opportunity for comment); *see also id.* at 712 (citing 28 U.S.C. § 332(d)(1) and noting that the Ninth Circuit's policy amendment "was not adopted after notice and comment procedures"). Thus, because the 1996 Policy remains the only valid Circuit rule in effect, this Court has no authority to permit public broadcast of trial proceedings. *See* 28 U.S.C. § 332(d)(2) ("All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.").

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[1] *See* http://www.ce9.uscourts.gov/cm/articlefiles/137-Dec17_Cameras_Press%20Relase.pdf.

Third, neither the amendment to L.R. 77-3 nor the Ninth Circuit Judicial Council's press release sets forth any standards or guidelines to regulate the selection of cases and the use of cameras during trial proceedings. The Supreme Court explicitly emphasized that this was a serious defect that supported its "decision to grant extraordinary relief." *Hollingsworth*, 130 S. Ct. at 713; *see also id.* ("The District Court here attempted to revise its rules in haste . . . to allow broadcasting of this high-profile trial without any considered standards or guidelines in place."); *id.* (explaining that "the lack of a regular rule with proper standards to determine the guidelines for broadcasting could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments"); *id.* (stating that "Congress has illustrated the need for careful guidelines and standards" in any program authorizing public broadcast of federal trial proceedings). Indeed, the Judicial Council's press release authorizes the "chief judge of the district court in consultation with the chief circuit judge" to select cases for public broadcast of district court trial proceedings. It appears, in fact, that the chief judges of the District Court and the Ninth Circuit have absolute discretion to select these cases. Yet neither the press release nor revised L.R. 77-3 provides any procedure by which litigants and other interested parties may present concerns and objections to the chief judges. This raises serious due process concerns.

Fourth, there is little merit to the Media Coalition's argument that "the concerns earlier reviewed by the Supreme Court should not preclude" the public broadcast of closing arguments because they "will solely consist of the arguments of counsel – and not witness testimony or evidence." As an initial matter, the parties may play excerpts from the video-recorded depositions during the course of closing arguments. In any case, in *Hollingsworth*, the Supreme Court specifically cited the findings and policies of the Judicial Conference of the United States, noting that while those policies "may not be binding on the lower courts, they are at the very least entitled to respectful consideration." 130 S. Ct. at 712 (quotation marks omitted). While it is true that the deleterious effect of public broadcast on witnesses is one of the concerns undergirding the Judicial Conference's policy, it is by no means the only concern. As we have explained previously, the Judicial Conference's policy also rests on findings that public broadcast has negative effects on some judges and attorneys, including distraction, grandstanding, and avoidance of unpopular decisions or positions. Moreover, the Judicial Conference has repeatedly stressed that "the presence of cameras in a trial courtroom . . . increases security and safety issues" and that "[t]hreats against judges, lawyers, and other participants could increase even beyond the current disturbing level." Doc # 324-2 at 4. And all of these findings were with respect to run-of-the-mine cases, not "high-profile, divisive cases" like this one. *Hollingsworth*, 130 S. Ct. at 714 (citing "warning by Judge Edward R. Becker that in 'truly high-profile

cases,' one can '[j]ust imagine what the findings would be' ").

For all of these reasons, and in light of the Supreme Court's stay opinion, Proponents respectfully submit that the Court should deny the Media Coalition's renewed request to publicly broadcast this federal trial.

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
Counsel for Proponents

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as

No C 09-2292 VRW

ORDER

(Filed May 31, 2010)

registrar-recorder/county clerk
for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA [sic] RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors. /

In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party. Parties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order, Doc #425. Any party wishing to make use of the video during closing arguments is DIRECTED to inform the court clerk not later than June 2, 2010 at 5 PM PDT.

IT IS SO ORDERED.

/s/ Vaughn Walker
VAUGHN R WALKER
United States District
Chief Judge

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City Attorney
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CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al, Plaintiffs, CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-Intervenor vs. ARNOLD SCHWARZENEGGER,	Case No. 09-CV-2292 VRW **NOTICE TO COURT CLERK FROM PLAINTIFF-INTERVENOR CITY AND COUNTY OF SAN FRANCISCO RE USE OF VIDEO** (Filed Jun. 2, 2010)

in his official capacity as Governor of California, et al Defendants, DENNIS HOLINGSWORTH, as official proponents of Proposition 8, et al, Defendant-Intervenors,	Trial: Jan. 11-27, 2010 Judge: Chief Judge Vaughn R. Walker Location: Courtroom 6, 17th Floor

NOTICE

Please take NOTICE that pursuant to the Court's Order [Doc #672], Plaintiff-Intervenor wishes to obtain a copy of the following portions of the trial video to review for possible use at closing argument:

Trial Date	**Witness**
January 14, 2010	Egan
January 15, 2010	Zia
January 19, 2010	Sanders / Badgett
January 20, 2010	Kendall

Plaintiff-Intervenor will maintain the video as strictly confidential pursuant to paragraph 7.3 of the protective order in this case [Doc #425].

Dated: June 2, 2010

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

NOTICE TO COURT CLERK RE PLAINTIFFS' REQUEST FOR A COPY OF THE TRIAL RECORDING

(Filed June 2, 2010)

Trial: January 11-27, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

Pursuant to this Court's May 31, 2010 order, Doc #672, Plaintiffs respectfully request a copy of the trial recording for possible use during closing arguments.

Respectfully submitted,

DATED: June 2, 2010

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as governor of California; EDMUND G BROWN JR, in his official capacity as attorney general of California; MARK B HORTON, in his official capacity as director of the California Department of Public Health and state registrar of vital statistics; LINETTE SCOTT, in her official capacity as deputy director of health information & strategic planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as clerk-recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as

No C 09-2292 VRW

ORDER

(Filed Jun. 9, 2010)

registrar-recorder/county clerk
for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAKSHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIOFORNIA [sic] RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors. /

The court is in receipt of the letter dated May 18, 2010 from a coalition of media organizations informing the court of the media coalition's interest in recording, broadcasting and webcasting closing arguments in the above-captioned case. Doc #670.

The court removed the case from the Ninth Circuit pilot project on audio-video recording and transmission on January 15, 2010. Doc #463. No further request to include the case in the pilot program is contemplated. The media coalition's request is therefore DENIED.

IT IS SO ORDERED.

/s/ Vaughn Walker
VAUGHN R WALKER
United States District
Chief Judge

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A PROJECT OF CALIFORNIA RENEWAL

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, SANDRA B. STIER, PAUL T. KATAMI, and JEFFREY J. ZARRILLO,

Plaintiffs

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of California; MARK B. HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; and DEAN C.

CASE NO. 09-CV-2292 VRW

DEFENDANT-INTERVENORS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, MARK A. JANSSON, AND PROTECT-MARRIAGE.COM'S MOTION FOR ADMINISTRATIVE RELIEF

(Filed Jun. 29, 2010)

LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, GAIL J. KNIGHT, MARTIN F. GUTIERREZ, HAKSHING WILLIAM TAM, and MARK A. JANSSON; and PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL,

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TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that pursuant to Civ. L.R. 7-11, Defendant-Intervenors Hollingsworth, Knight, Gutierrez, Jansson, and ProtectMarriage.com ("Proponents") hereby move the Court for an order requiring Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession.

BACKGROUND

On January 13, 2010, the Supreme Court stayed this Court's order that the trial proceedings in this case be recorded and broadcast beyond the San Francisco federal courthouse. *Hollingsworth v. Perry*, 130 S. Ct. 705, 714-15 (2010). The stay remains in effect. *Id.*

In court the next day, Proponents asked "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." Trial Tr. 753. When the Court responded that the recording had "*not* been altered," Proponents reiterated that, "in light of the stay, . . . the court's local rule . . . prohibit[s] continued tape recording of the proceedings." *Id.* at 753-54 (emphasis added). Rejecting Proponents' objection, the Court stated that the "local rule permits . . . recording for purposes of *use in chambers* and that is customarily done when we have these remote courtrooms or the overflow courtrooms." *Id.* (emphasis added). The Court concluded, "that's the purpose for which the recording is going to be made going forward." *Id.*

On May 31, the Court *sua sponte* announced: "In the event any party wishes to use portions of the trial recording during closing arguments, a copy of the video can be made available to the party." Doc #672 at 2. Plaintiffs and Plaintiff-Intervenor each requested and obtained copies of the trial video – the former requesting the entire video, the latter the testimony of certain witnesses. *See* Doc ##674, 675.

Closing arguments were held on June 16. Proponents thereafter requested Plaintiffs and Plaintiff-Intervenor promptly to return all copies of the trial video in their possession to the Court, but they denied the request. *See* Decl. or Peter A. Patterson in Support of Proponents' Motion for Administrative Relief.

ARGUMENT

Now that closing arguments are complete, the sole purpose identified by this Court for disseminating copies of the trial video to Plaintiffs and Plaintiff-Intervenor – potential use at closing argument – has been satisfied. There is simply no legitimate justification for permitting Plaintiffs and Plaintiff-Intervenor to maintain possession of copies of the trial video.

What is more, in issuing its stay order, the Supreme Court held that "irreparable harm" would "likely result" from public broadcast of the trial. *Hollingsworth*, 130 S. Ct. at 712. The risk of such harm, of course, does not depend on the means by which a trial recording is made public. And even with this

Court's requirement that all copies of the trial video be "maintain[ed] as strictly confidential," Doc #672 at 2, it cannot be denied that dissemination beyond the confines of the Court has increased the possibility of accidental public disclosure. In light of this possibility, we respectfully submit that there is no justification for this Court to permit Plaintiffs and Plaintiff-Intervenor to maintain copies of the trial recording.

CONCLUSION

For these reasons, Proponents request an order directing Plaintiffs and Plaintiff-Intervenor to return to the Court immediately all copies of the trial video in their possession.

Dated: June 29, 2010

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, *et al.*,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

ARNOLD SCHWARZENEGGER, *et al.*,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, *et al.*,

Defendant-Intervenors.

CASE NO. 09-CV-2292 VRW

PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR ADMINISTRATIVE RELIEF

(Filed Jun. 29, 2010)

Trial: January 11-27, 2010

Closing: June 16, 2010

Judge: Chief Judge Vaughn R. Walker
Magistrate Judge Joseph C. Spero

Location: Courtroom 6, 17th Floor

Plaintiffs and Plaintiff-Intervenor respectfully request that the Court deny Defendant-Intervenors' motion for administrative relief. Doc #696. On May 31, 2010, the Court informed the parties that the trial video would be made available "[i]n the event any

party wishes to use portions of the trial recording during closing arguments." Doc #672. The Court stated that "[p]arties will of course be obligated to maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order, Doc #425." *Id.* Plaintiffs and Plaintiff-Intervenor both requested copies of the trial video, Docs #674, 675, and Plaintiffs used portions of the video during closing argument.

Because this Court has yet to issue its decision and may request additional arguments or briefing before doing so, Defendant-Intervenors' request for the immediate return of the trial video should be denied as premature. Plaintiffs and Plaintiff-Intervenor respectfully propose that once judgment is entered, the parties and the Court evaluate whether, and to what degree, the trial recording would be useful to the parties or to the Court in connection with any additional proceedings and/or appeal. In the meantime, the protective order remains in place and ensures that the trial recording will not be publicly disclosed.

Respectfully submitted,

DATED:
June 29, 2010

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